

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1985

In re
W. T. GRANT COMPANY,

Bankrupt.

DAVID COSOFF and HELEN FINKELSTEIN,
Petitioners,

-against-

CHARLES G. RODMAN, as Trustee of the
Estate of W. T. GRANT COMPANY, Bankrupt,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF RESPONDENT UNITED STATES TRUST
COMPANY OF NEW YORK IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

I. Should the Court grant the petition for a writ of certiorari (the "Petition") in this case where the Petitioners have failed to show that there are special and important reasons therefor, as required by Rule 17 of the Rules of this Court?

II. Did the Court of Appeals apply the correct standard for reviewing an order approving a settlement of a suit in the Bankruptcy Court?

III. Should the order approving a settlement of claims in the Bankruptcy Court be reversed on the grounds that the attorney for the bankruptcy trustee is accused of having a conflict of interest, where the trial court and the reviewing courts found no truth in those allegations and where the beneficiaries of the settlement are represented by an independent indenture trustee and independent counsel?

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**CITATIONS TO THE OPINIONS
OF THE COURTS BELOW**

The United States Court of Appeals for the Second Circuit, 699 F.2d 599 (2d Cir. 1983), (Petitioners' Appendix 3a) rehearing denied March 8, 1983, unanimously affirmed an order of the United States District Court for the Southern District of New

York, 20 B.R. 186 (S.D.N.Y., 1982), (Petitioners' Appendix 34a), which affirmed an order of the United States Bankruptcy Court for the Southern District of New York (Bankr. Ct. S.D.N.Y. 1981), (Respondents' Appendix 1a), which approved a settlement of claims. The Bankruptcy Court order adopted the findings and conclusions from a prior decision which approved an earlier settlement of the same claims. 4 B.R. 53 (Bankr. Ct. S.D.N.Y. 1980) (Respondents' Appendix 5a).

STATEMENT OF THE CASE

The Petitioners seek a writ of certiorari to the United States Court of Appeals for the Second Circuit ("the Second Circuit") to review a decision and order of the Second Circuit filed January 26, 1983 (the "Decision") and an order which denied a petition for rehearing of the Decision, dated March 8, 1983. The Decision affirmed an order of the United States District Court for the Southern District of New York, dated March 15, 1982 (the "District Court Order"). The District Court Order affirmed an order of the United States Bankruptcy Court for the Southern District of New York, dated June 23, 1981 (the "Bankruptcy Court Order"). The Bankruptcy Court Order authorized and approved an amended offer of settlement by Charles G. Rodman, as trustee (the "Trustee") of the estate of the bankrupt W.T. Grant Company ("Grant"). The amended offer of settlement would resolve the adverse claims of 26 bank claimants of Grant (the "Bank Claimants") and the claims of holders of Grant's 4¾% Convertible Subordinated Debentures due 1996 (the "Debentures") and Grant's 4% Convertible Subordinated Debentures due 1990.

The Bankruptcy Court Order supplemented a prior decision and order, dated February 20, 1980, which is reported at 4 B.R. 53 (Bankr. Ct. S.D.N.Y. 1980) (the "Bankruptcy Court Decision") (Respondent's Appendix 5a). The Bankruptcy Court Decision authorized and approved an offer by the Trustee to settle the claims of the Debentureholders, pursuant to which the Debentureholders would receive a gross payment of 15% of the

principal amount of each Debenture tendered in acceptance of the offer (the "Initial Offer"). Several Debentureholders who objected to the terms of the Initial Offer ("Objectants") took appeals from the Bankruptcy Court Decision to the United States District Court for the Southern District of New York. During the pendency of that appeal, discussions occurred which resulted in a proposed amendment of the Initial Offer (the "Amended Offer"). As a result of the Amended Offer, that appeal was withdrawn by Objectants with prejudice.

The Amended Offer increased the gross amount payable under the Initial Offer to Debentureholders from 15% to 21% of the principal amount of each Debenture tendered in acceptance of the Amended Offer. The gross amount which tendering Debentureholders would receive under the Amended Offer would be reduced by a *pro rata* share of certain fees and expenses; however, the net amount payable to Debentureholders was not to be less than 19% of the principal amount of each Debenture tendered. The Amended Offer specified that no payments could be made to accepting Debentureholders while an appeal or petition for certiorari was pending from an order approving the Amended Offer. The Bankruptcy Court Order approved the Amended Offer relying on the findings in the Bankruptcy Court Decision.

The Bankruptcy Court conducted six days of hearings in connection with the Initial Offer during which five witnesses testified. The transcript of the hearing consisted of 987 pages and 80 exhibits were received in evidence aggregating at least 1,500 additional pages. The participants in those hearings included the Trustee, United States Trust Company of New York ("U.S. Trust"), as Successor Indenture Trustee for the Debentureholders, and the Objectants.

The Amended Offer has been distributed to the Debentureholders. A statement by the Petitioners in opposition to the Amended Offer was distributed to the Debentureholders along with the Amended Offer. As of July 1, 1983, the holders of over \$89 million in principal amount, or over 96% of the principal amount outstanding, of the Debentures, have accepted the Amended Offer by tendering their Debentures.

This case is closely related to the settlement in the case entitled *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), *petition for cert. filed sub nom Lewy v. Weinberger*, 51 U.S.L.W. 3859 (May 17, 1983). *Weinberger* involved claims by various security holders who purchased the Grant securities. The plaintiffs in *Weinberger* alleged that the Bank Claimants had dominated and controlled the Grant management (698 F.2d at 66)—precisely the same allegations which form the basis of the Debentureholders' claims that are resolved by the Amended Offer, on virtually the identical record as in this case and which are the subject of the Decision which Petitioners seek to have this Court review. The Second Circuit affirmed the order approving the *Weinberger* settlement in an extensive decision reviewing the law and the record, found the settlement to be fair, reasonable and adequate, and found neither merit in the same claims on which Petitioners seek to have this Court rule nor factual support in the record to support the claims. 698 F.2d at 75.

This response is submitted by U.S. Trust as successor Indenture Trustee under an indenture dated as of April 15, 1971 between Grant and the Chase Manhattan Bank, N.A., as Indenture Trustee, pursuant to which the Debentures were issued. U.S. Trust, as successor Indenture Trustee, represents the interests of all Debentureholders, and responds to the Petition to protect the interests of the holders of over 96% in principal amount outstanding of the Debentures who have indicated, by tendering their Debentures, their acceptance of the Amended Offer. Petitioners' actions have prevented the accepting Debentureholders from receiving payment for their tendered Debentures because the Trustee is precluded under the Amended Offer from making payment to the Debentureholders while an appeal or a petition for certiorari is pending from the Bankruptcy Court Order. U.S. Trust has participated in these proceedings to represent the interests of the accepting Debentureholders and U.S. Trust urges this Court to deny the petition for a writ of certiorari so that no further prejudice shall be suffered by the overwhelming majority of Debentureholders who have accepted the Amended Offer.

SUMMARY OF ARGUMENT

The Court should not grant a petition for a writ of certiorari where the petitioner has not demonstrated the existence of any issue which would justify this Court exercising its discretion to issue the writ. Rule 17 of the Rules of the Supreme Court of the United States. The Court should not grant the Petition to review the findings of fact which were affirmed by the District Court and the Court of Appeals.

The Decision approved the settlement of claims in a bankruptcy proceeding. In approving a settlement, a judge must make an informed judgment of the issues. However, a judge approving a settlement is not required to conduct a full-scale trial to evaluate the settlement, but must determine whether the settlement is reasonable. The bankruptcy judge in this case conducted extensive hearings and entered a lengthy opinion in connection with an earlier offer of settlement, which decision was adopted in connection with the Amended Offer. There is no reason for this Court to grant the petition for a writ of certiorari when the Bankruptcy Court properly executed its duties and the District Court and the Court of Appeals found that a proper hearing was held and that the settlement was reasonable. Further, the Court should refrain from granting the Petition and providing a disincentive to the settlement of comparable cases.

There are no findings by any of the lower courts to support the Petitioners' allegations of conflict of interest by the attorneys for the Bankruptcy Trustee. However, regardless of those allegations, the Debentureholders who are the beneficiaries of the settlement were represented by an independent Indenture Trustee and its independent counsel. The Court should not grant the petition on the basis of the alleged conflict of interest where the Debentureholders were independently represented and therefore could not be injured by the alleged conflict.

ARGUMENT

I. Petitioners have failed to show that there are "special and important considerations" for granting the Petition.

Rule 17 of the Rules of this Court state the standard to be applied on consideration of a petition for a writ of certiorari:

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor.

The above-quoted sentence is followed by three types of reasons as illustrative of the character of reasons that will be considered.

The petition in this case does not raise any special or important reasons that call for this Court to exercise its discretion to hear his case.

The Decision of the Court of Appeals involved a lengthy and thorough review of issues and affirmed the District Court Order which had affirmed the Bankruptcy Court Order and the extensive Bankruptcy Court Decision. Petitioners seek to raise here a number of factual issues which were resolved against them by the findings of the Bankruptcy Court, and which were affirmed by the District Court and the Court of Appeals. There is no reason for this Court to exercise its discretion to grant a writ of certiorari to review the findings of fact of the lower court. "Granting of the writ would not be warranted merely to review the evidence or the inferences to be drawn from it." *General Talking Pictures Corp. v. Western Electric*, 304 U.S. 175, 178 (1938). This Court has often stated that it will not exercise its discretion to grant certiorari where a case turns on a factual issue decided by the Court of Appeals upon a fair assessment of the record. *Federal Trade Commission v. Standard Oil Co.*, 355 U.S. 396, 398 (1958).

However, the fundamental fact which is ignored or overlooked in the Petition is that the Decision of the Court of Appeals arises in the context of approving a settlement. As set

forth below (Point II) the Court of Appeals and the lower courts applied the correct standard for approving a settlement. The settlement of this case does not provide a proper context for this Court to exercise its discretion to grant the Petition. The Court of Appeals observed at several points in the Decision that the Bankruptcy Court's task, and that of the reviewing courts, was to determine whether the settlement fell below the lowest point in the range of reasonableness. 699 F.2d at 608, 613. *Newman v. Stein* 464 F.2d 689, 693 (2d Cir.) *cert. denied sub nom. Benson v. Newman*, 409 U.S. 1039 (1972).

The Petitioners do not argue that the standard for approving a settlement is different in the Court of Appeals for the Second Circuit than in any other federal court of appeals or state court of last resort. Nor do they argue that the order of the Court of Appeals involves a departure from accepted and usual judicial proceedings. In other words, the Petition fails to raise the kind of issues which this Court has indicated are necessary for this Court to exercise its discretion to review a case on a writ of certiorari.

II. The Court of Appeals applied the correct standard for reviewing an order approving a settlement of a suit in the Bankruptcy Court.

The Court of Appeals and the lower courts in their respective decisions correctly emphasized the fact that their task was to consider the approval of a settlement, not to make rulings on the substantive merits of the dispute.

The standards for approval of a settlement such as the one in this case, were set forth by this Court in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968) ("TMT"). The TMT case stated the standard to be applied by a bankruptcy judge approving a settlement, and requires the judge to make an informed judgment of the issues.

In this case, the Bankruptcy Judge, who had supervised the Grant bankruptcy proceeding since its commencement in October, 1975, conducted six days of hearings, at which five wit-

nesses testified and 80 exhibits were received in evidence. The Bankruptcy Trustee, the Bank Claimants, the Indenture Trustee and the Objectants all appeared and were heard at those hearings. After the close of the hearings the Bankruptcy Judge, in a "careful and well-reasoned" decision considered each of the elements in the *TMT* standard, reviewed the extensive record and the law applicable to the facts. *Weinberger v. Kendrick*, 698 F.2d at 74.

The *TMT* standards do not require the bankruptcy judge to conduct a full-scale trial in connection with a settlement. *City of Detroit v. Grinnell Corp.* 495 F.2d 448, 462 (2d Cir. 1974) ("The Court must eschew any rubber stamp approval in favor of an independent evaluation, yet at the same time stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." 495 F.2d at 462), *Weinberger v. Kendrick*, *supra*, ("The Supreme Court could not have intended that, in order to avoid a trial, the judge must in effect conduct one." 698 F.2d at 74). See also, *Newman v. Stein*, 464 F.2d 689 (2d Cir.) *cert. denied sub. nom. Benson v. Newman*, 409 U.S. 1039 (1972).

As noted by the Court of Appeals, the issue in reviewing the Bankruptcy Court Order is not whether the settlement was the best that could have been obtained, but whether it "fall[s] below the lowest point in the range of reasonableness" *Newman v. Stein*, *supra* 464 F.2d at 693. As viewed by the Court of Appeals, this settlement "can hardly be regarded as below the lowest point in the range of reasonableness." 699 F.2d at 614.

The Petitioners do not contest that the above described standards are the proper ones, or that some other federal court of appeals would apply the standards differently. Therefore, there is no basis for this Court to exercise its discretion to grant a writ of certiorari and hear this case. See Point I, *supra*.

There is a valid policy reason to deny the Petition. The parties resolved to settle this suit to avoid the time, expense and uncertainty of litigation. The decision approving the initial settlement was entered February 20, 1980 and has since been the subject of lengthy appeals which have brought the case to its present

posture. The holders of over 96% in principal amount of Debentures have accepted the settlement by tendering their Debentures. Those who have accepted the offer have not collected one cent of the settlement fund to which they are entitled because of the appeals by the Petitioners. The benefits of a settlement are lost, and a major inducement to settle is removed, if settlements can be delayed indefinitely by appeals. If this Court were to grant the Petition, it would not only further delay the settlement in this case, but would deter parties in other litigations from settling where receipt of the settlement proceeds could be indefinitely delayed by extended appeals. Because there is no clear and compelling reason to issue a writ of certiorari in this case, this Court should deny the Petition.

III. The Court should not grant certiorari on the basis of the allegations of conflict of interest of the Trustee's counsel.

The Petition asserts that the Court should grant the petition for a writ of certiorari and reverse the decision of the Court of Appeals on the grounds that the counsel to the Trustee has an alleged conflict of interest. These allegations were considered by the lower courts and the Court of Appeals and found neither to be supported by the evidence nor the basis for disqualification. Specifically, the Court of Appeals held that representation of creditors or a creditors' committee does not disqualify a lawyer from representing a bankruptcy trustee. (699 F.2d at 613) The Bankruptcy Judge who observed the actions of the Trustee's counsel concluded that they "have served him and the creditors of the bankrupt estate with vigor, objectivity and independence." (699 F.2d at 613).

Furthermore, the Debentureholders who are the beneficiaries of the settlement in this case were represented by an independent Indenture Trustee and independent counsel. U.S. Trust and its counsel participated actively in all aspects of the Grant proceeding. U.S. Trust on behalf of the Debentureholders initiated many of the allegations against the Bank Claimants which are the subject of the settled controversy and U.S. Trust represented the Debentureholders in the negotiations which

resulted in both the Initial Offer and the Amended Offer. Therefore, regardless of the accusations against the Trustee's counsel, the interests of the Debentureholders have been independently represented at all times by the Indenture Trustee and its counsel. The Court should not exercise its discretion and grant the Petition where unsupported allegations are being used to suggest an issue which is lacking in substance, and particularly where the Debentureholders were represented by an independent Indenture Trustee and independent counsel.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for a writ of certiorari in this case and award U.S. Trust double costs pursuant to 28 U.S. Code 1912 and Rule 50.7 of the Rules of this Court.

Respectfully submitted,

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